NO. 79364-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Detention of:

David James Lewis,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules

RCW 71.09.030 (1) permits filing of a "predator" petition only where "[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement. ...". (emphasis added)

Despite whatever arguments are made, this case should center on what procedure the legislature has set forth to trigger petitions under RCW Chap. 71.09.

Apart from other requirements, the subject of the petition must have a status of "about to be released" before he or she meets the requirements of the statutory scheme.

Since Mr. Lewis was being held in custody awaiting a criminal trial when the petition was filed, there are no facts suggesting he was "about to be released." We do know the criminal charge was dismissed after the Sexually Violent Predator petition was filed. But a criminal charge could not be properly used merely to hold

Mr. Lewis for the purpose of replacing the charge with the civil commitment petition. The question arises, can the State decide that it makes sense to file a Sexually Violent Predator petition when the subject is awaiting trial? Only if the State Attorney General's office is enacting law. Petitioner submits that the statute is unambiguous.

Interpretation of a statute, is a matter of law, which the appellate court reviews de novo. *WR Enters., Inc. v. Dep't of Labor & Indus.,* 147 Wn.2d 213, 218, 53 P.3d 504 (2002).

If a statute is clear on its face, the Court will derive its meaning from the language of the statute. *Kilian v. Atkinson,* 147 Wn.2d 16, 20-22, 50 P.3d 638 (2002). A statute is not ambiguous simply because different interpretations are conceivable. *Kilian,* 147 Wn.2d at 22.. Nor is an undefined term in a statute ambiguous if the term has a broad or a well-accepted, ordinary meaning. *Coal. for the Homeless,* 133 Wn.2d 894, 906-07, 949 P.2d 1291 (1997). Would a person confined to a jail awaiting trial say "I am about to be released."? No, because there would be no basis to believe he is about to be released. The situation of Mr. Lewis at the time the petition was filed does not meet the "well-accepted, ordinary meaning" of "about to be released."

"Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian,* 147 Wn.2d at 21, (citing *Associated Gen. Contractors v. King County,* 124 Wn.2d 855, 865, 881 P.2d 996 (1994).)

When a statute is not ambiguous, only a plain language analysis of a statute is

appropriate. *Cerrillo v. Esparza,* 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

Pre-trial detention does not seem to be a likely point at which it would be determined that a person was "about to be released" for the purposes of commencing an SVP petition. The defendant may post bail and be released for that reason, without adequate notice to the State to commence an SVP petition. Or the defense may convince the court to change an earlier decision on release pending trial, and allow the defendant out of custody pending trial pursuant to conditions, under CrR 3.2. It is unlikely considering the reality of that scenario that the legislature envisioned pre-trial detention as a juncture for filing of SVP petitions.

This view is bolstered by RCW 71.09.025, which lists a number of situations in which the prosecuting attorney of a county is supposed to be

notified three months in advance of the release of a person incarcerated for a sexually violent offense. Mere pre-trial release on an unproven charge is not among those situations triggering that notice provision, and three months notice would often not be possible where the trial would usually be set within 60 days of arraignment for a defendant in custody. CrR 3.3.

Release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to RCW 10.77.090(4) is one situation laid out in RCW 71.09.025 (1)(a) (iii) triggering the notice provision.

But that is not merely pre-trial detention, but a court-ordered period of treatment intended to restore a person's competency. (RCW 10.77.090 was repealed effective July 22, 2007.) Under RCW 10.77.086, a person found to be incompetent to stand trial can be ordered into treatment in a state hospital for ninety days, which may be extended another ninety days, so they are not merely being held pending trial.

Further. a person determined to be incompetent while charged with a sexually violent offense falls into a separate category of RCW 71.09.030, which is sub-part (3) , and therefore has a different predicate criteria than Mr. Lewis, who must fall under RCW 71.09.030 (1) if he falls under the

statutory scheme at all.

The State's position requires the Court to rewrite the statute to fit whatever situation the Attorney General deems appropriate. The Court should hold that RCW 71.09.030 (1) is unambiguous, that it does not apply to the facts here, reverse the judgment finding Mr. Lewis to be a sexually violent predator due to a lack of jurisdiction, and dismiss the petition with prejudice.

II. The Court should reject the reasoning of Court of Appeals decisions which contradict the plain language of the statute

Our Supreme Court has held that due process does not require proof of a ROA "when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense." *In re Henrickson,* 140 Wn.2d 686, 689, 2 P.3d 473 (2000).

In *Fair v. State*, __ Wn. App. __ 161 P.3d 466, 470 (July 3rd, 2007), Fair's sentence for a sexually violent offense expired, but he stayed in custody to serve a sentence for a robbery conviction. He was not released into the community between the incarceration for the sexually violent offense and the robbery sentence.

Fair argued on appeal that because he was not incarcerated for a

sexually violent offense at the time of the filing of the State's petition under RCW Chap. 71.09, nor had he committed a recent overt act, then the statute did not apply to him. Division 2 of the Court of Appeals reasoned:

> He was not released into the community between the incarceration for the sexually violent offense and the robbery sentence and, thus, he had no opportunity to commit a ROA in the community. Requiring proof of a ROA under these circumstances would be absurd. *See Henrickson,* 140 Wn.2d at 695.

Fair v. State, ___Wn. App. at ___ 161 P.3d at 470.

Petitioner anticipates similar reasoning by the State in this case: Mr. Lewis went from incarceration for a conviction of a sexually violent offense to being held in custody awaiting trial, therefore he had no opportunity to commit a recent overt act. That leaves only the other statutory alternative, that he was about to be released.

But, if the State argues, his position is absurd, as his position means he could never have a SVP petition filed against him, that is false. A) It could've been filed before his release from his sentence. The State would have a more persuasive argument that Mr. Lewis was "about to be released" when he was going from serving a sentence, to pre-trial detention, then arguing he was about to be released when awaiting trial, B) If trial proceeded and he was convicted then it could

have been filed before his release.

Regardless of whether *Fair* is valid under the facts of that case, where the individual goes from incarceration for a sexually violent offense to a sentence for robbery, it's logic should not be extended to every situation where the State can contend it is "absurd" that there would be no jurisdiction to file a petition under RCW Chap. 71.09.

III. Conclusion

This Court should hold that where an individual has been released from a sentence for a sexually violent offense, and is in jail pending trial on a criminal charge, that the individual is not "about to be released" for the purposes of RCW 71.09.030 (1). The Court should hold there was no jurisdiction for the petition in this case, and reverse the order of commitment and dismiss the petition.

Dated this 9th day of October, 2007

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Certificate of Mailing

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TO E-MAIL

I hereby certify that on the 9th day of October , 2007, I mailed true and accurate copies of the foregoing Brief of Appellant to, Sarah Sappington, Assistant Attorney General, at 800 5th Ave., Ste. 2000, Seattle, WA 98104-3188, and to David Lewis , Petitioner, at P.O. Box 88600, Steilacoom, WA 98388, postage prepaid.

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